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No. 78-1228

In the Supreme Court of the United States

OCTOBER TERM, 1978

BERTRAM E. SEIDLITZ, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals is reported at 589 F. 2d 152.

JURISDICTION

The judgment of the court of appeals (Pet. App. A1-A16) was entered on December 5, 1978. A petition for rehearing was denied on January 9, 1979. The petition for a writ of certiorari was filed on February 7, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the Fourth Amendment's requirements apply to the tracing of telephone calls to determine their origin.

2. If so, whether the tracing in this case was a private search.

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioner was convicted on two counts of wire fraud, in violation of 18 U.S.C. 1343. He was sentenced to three years' imprisonment on the first count, with all but three months suspended, and to three years' probation on the second count. The court of appeals affirmed (Pet. App. A1-A16).

In January 1975, petitioner became Deputy Project Director for Optimum Systems, Inc. (OSI), a private computer service company that was under contract to install, maintain, and operate a computer facility at Rockville, Maryland, for use by the Federal Energy Administration (FEA) (Tr. 3, 20, 24).[1] When completed, the computer facility was to be available to employees of FEA in various parts of the country through computer terminals in their offices, which could be connected with the central computer by ordinary telephone circuits (H. Tr. 40-41). As a security precaution, each authorized user of the computers was assigned a personal access code, which, when entered into the terminal and communicated to the central computers, would permit full use of the computers. As part of his broad responsibilities for the establishment and operation of the computer system, petitioner had full access to the computers and to a programming system contained in them, known as "WYLBUR," which had been specially modified by OSI for use by its clients (Tr. 13-20, 30-31). In June 1975, petitioner resigned from OSI and returned to work at his

[1] "Tr." refers to the trial transcript; "H. Tr." refers to the transcript of the hearing on petitioner's motion to suppress.

own computer firm in Alexandria, Virginia; his access code was deleted from the list of those identifying authorized users (Tr. 24, 26, 31, 153, 531).

On December 30, 1975, FEA and OSI employees discovered that an unauthorized person had gained access to the OSI computers (Tr. 75, 77). They determined that the computer was transmitting to the intruder a portion of the "source code" of the WYLBUR system[2] and that the data were being requested from outside the OSI facility, by a telephone connection (Tr. 131-134, 191). At the request of an OSI supervisor, the telephone company initiated a manual trace[3] to determine the origin of the call (H. Tr. 54-55). The telephone company informed OSI that the trace had been successful, but that the results of the trace could not be disclosed except in response to some legal action (H. Tr. 55). On the following day, when it appeared that the same intruder was again using the OSI computers, OSI again asked the telephone company to trace the call.

After December 31, OSI contacted the FBI (H. Tr. 56, 69, 78). Two more manual traces were conducted on January 5, at the suggestion of the FBI, but the calls were terminated before the traces had been completed (H. Tr. 67-69). Automatic equipment was then installed in the telephone company's Lanham, Maryland office, the last point to which the two previous calls had been traced, and on January 9, 1976, the equipment attributed two calls made to the OSI computers to a specific telephone

[2] A "source code" is the means used to give a computer instructions (Pet. App. A4 n.6).

[3] A manual trace involves a physical tracking of the telephone circuitry from the equipment that receives the call back through the various switching points to the equipment that originated the call. It is accomplished without listening to any conversation or intercepting any audible sounds (H. Tr. 64-66).

number in the area served by the Lanham office (H. Tr. 70-72).[4] The telephone company's trace records, which were obtained by the FBI pursuant to a subpoena, showed that the calls made on December 30 and 31 originated in petitioner's Virginia office, and that the calls on January 9 were made from petitioner's residence in Lanham, Maryland (H. Tr. 64-67, 71-73). Searches of petitioner's office and residence, both conducted pursuant to warrants, revealed a portable computer terminal, a copy of the user's guide to the OSI system as well as a notebook containing access codes for authorized users of the OSI computers, and some 40 rolls of computer paper on which were printed the WYLBUR source code (Tr. 247, 251, 258, 303-304, 311, 323).

ARGUMENT

1. Petitioner contends (Pet. 8-9) that his Fourth Amendment rights were violated by the use of special equipment to trace the telephone calls he made to the OSI computers. He claims that this case merits further review because the question whether a search warrant or court order is required for the use of a tracing device is identical to the issue presented in *Smith* v. *Maryland*, No. 78-5374, argued March 28, 1979.

In fact, however, the question to be decided in *Smith* v. *Maryland* is significantly different from the one petitioner poses. In *Smith*, the device at issue is a pen register,[5]

[4]The automatic equipment used by the telephone company operates like a manual trace, except that the automatic process is much faster. The equipment was programmed to record and print out any telephone number among that area's subscribers from which a call was placed to the OSI computers. Again, no audible sounds are intercepted in this process (H. Tr. 70).

[5]A pen register is a mechanical device that records the telephone numbers dialed from a monitored telephone. Its function is thus the reverse of a trace, which determines the origin of calls received by the monitored telephone. Neither device intercepts the content of a

which was installed on the defendant's telephone line when it was suspected that he was the person who had first robbed a woman and then made a series of obscene and threatening phone calls to her (*Smith* Pet. App. A2-A3). The question there is whether installation of the pen register without a warrant or court order was a violation of the defendant's Fourth Amendment rights.

While the operations of a pen register and a tracing device have similarities, there are significant differences in the nature of the privacy interests implicated because of the way the devices were used in the two cases. Thus, in *Smith* the petitioner claims a violation of his constitutionally protected privacy interests because *his* telephone was monitored by the pen register. In contrast, in the instant case, the monitored telephone belonged not to petitioner but to the recipient of his call, which had requested that its own phone be monitored in this fashion. Petitioner's claim here is accordingly only that he has a constitutionally protected privacy interest in making anonymous telephone calls. His interest is not substantially different from that of persons making obscene or threatening phone calls—such calls have traditionally been traced by the telephone company at the request of the victim or the police without any suggestion that the constitutional rights of the caller are being infringed. Cf. *United States* v. *Miller*, 425 U.S. 435, 443 (1976); *United States* v. *White*, 401 U.S. 745, 749 (1971); *Hoffa* v. *United States*, 385 U.S. 293, 302 (1966); *Lopez* v. *United States*, 373 U.S. 427 (1963).

We are of the view that the Fourth Amendment does not require either a warrant or probable cause as a prerequisite to the use of pen registers in official investigations. The pen register reveals only the number dialed, which is in substance a request to the telephone

communication. See *United States* v. *New York Telephone Co.*, 434 U.S. 159, 161 n.1 (1977); *Michigan Bell Tel. Co.* v. *United States*, 565 F. 2d 385, 388 n.5 (6th Cir. 1977).

company to complete a connection; it does not disclose whether the connection is made, still less the contents of the call. The telephone company's decision to disclose this information does not implicate personal privacy interests of sufficient significance to be considered a search within the scope of the Fourth Amendment. See *Hodge* v. *Mountain States Tel. & Tel. Co.*, 555 F. 2d 254, 256 (9th Cir. 1977); *United States* v. *Clegg*, 509 F. 2d 605, 610 (5th Cir. 1975).[6]

Even if this Court should conclude in *Smith* that the user of a monitored telephone has a privacy interest in the numbers he dials from the telephone substantial enough to merit the protection of a warrant or probable cause requirement, it does not follow that each person placing calls to a monitored telephone has a similarly substantial interest. As a result of a specific decision to focus on the caller's telephone, as in *Smith*, the entire pattern of the user's telephone communications is disclosed to the official investigation. In contrast, in the instant situation, there was no such specific focusing of the investigation on petitioner, and no similar surveillance of all the numbers he called. Instead, only two calls were identified as originating with his telephone. The privacy interest asserted by petitioner is at best analogous to those of the "casual visitor who walks into a house one minute before a search of the house commences and leaves one minute after the search ends"—interests that this Court in *Rakas* v. *Illinois*, No. 77-5781 (Dec. 5, 1978), slip op. 14, cited as an example of those not protected by the Fourth Amendment.[7]

[6]Alternatively, if the use of a pen register does involve a search, the substantial government interest in effective criminal investigations outweighs the limited intrusion into personal privacy involved in simply discovering the telephone numbers called, but not the contents of the calls. Cf. *Terry* v. *Ohio*, 392 U.S. 1, 21-25 (1968).

[7]Indeed, as the court of appeals noted (Pet. App. A14-A15), petitioner's position can also be analogized to an unauthorized intruder, since he "used the telephone to tamper with and manipulate

Finally, in the circumstances of this case petitioner's claim of a "reasonable expectation of privacy" is implausible. Petitioner was not conventionally using the telephone as a means of communicating; he was using it to evade a system that he well knew was designed to permit only carefully restricted access to the OSI computers. Petitioner cannot claim to have been an unsuspecting caller with little reason to believe that his calls might be traced. He must have expected that OSI would be alert to the possibility that unauthorized users might gain access to their computers and that it would make serious efforts to prevent such access and to identify those who attempted it. There is thus no basis for asserting a reasonable expectation of privacy with regard to the placing of these calls. See *United States* v. *White*, 401 U.S. 745, 749 (1971); *Katz* v. *United States*, 389 U.S. 347, 351-352 (1967).

2. Assuming *arguendo* that the Fourth Amendment would require the suppression of the fruits of an official investigation based on the warrantless tracing of OSI's telephone, the court of appeals correctly concluded that the discovery of petitioner's number here was the result of a private investigation by OSI and the telephone company (Pet. App. A12-A14).

Petitioner maintains that the installation of the tracing device was the result of governmental action, because the FBI had suggested that further tracing be attempted after the December 30 and 31 calls. In fact, however, the unsuccessful manual traces on January 5 and the use of

a machine which was owned by others, located on their premises, and obviously not intended for his use." It has been clear at least since *Jones* v. *United States*, 362 U.S. 257 (1960), that Fourth Amendment protections do not extend to one who is not legitimately on the premises searched. See *Rakas, supra*, slip op. 12-14.

Analytically, petitioner's argument would be the same if he were a burglar who had left fingerprints in his victim's house and was complaining about the warrantless entry of the police into that house, at the victim's request, to search for the fingerprints.

the automatic tracing equipment were part of a continuing effort to discover the identity of the unauthorized user of the computers, an effort undertaken and continued at the request of OSI. It was an OSI supervisor who first requested that the calls be traced on December 30 and 31; neither the local police nor the FBI were contacted until after those traces had been successfully completed. There is absolutely no indication that the initial traces were approved or participated in by any law enforcement officers, nor that the traces were requested by OSI for any reason other than their own desire to put a stop to the unauthorized use of their computer system. OSI's notification of and subsequent cooperation with the FBI is insufficient to convert an otherwise private search into government action subject to Fourth Amendment scrutiny. *Coolidge* v. *New Hampshire*, 403 U.S. 443, 448 (1971); *United States* v. *Lamar*, 545 F. 2d 488, 490 (5th Cir.), cert. denied, 430 U.S. 959 (1977); *United States* v. *Pryba*, 502 F. 2d 391, 401 (D.C. Cir. 1974), cert. denied, 419 U.S. 1127 (1975); *United States* v. *Blanton*, 479 F. 2d 327, 328 (5th Cir. 1973); *United States* v. *Harless*, 464 F. 2d 953, 956-957 (9th Cir. 1972); see also *Burdeau* v. *McDowell*, 256 U.S. 465, 475-477 (1921).[8]

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[8]The cases cited by petitioner (Pet. 8) do not support his claim that federal officials had a "major share" in the telephone traces conducted in this case. In *United States* v. *Crabtree*, 545 F. 2d 884, 885-886 (4th Cir. 1976) (search of package by private air freight company), *United States* v. *Ford*, 525 F. 2d 1308, 1312 (10th Cir. 1975) (search of package by airline officials), and *United States* v. *West*, 453 F. 2d 1351, 1357 (3d Cir. 1972) (search of automobile by its owner at direction of police), the searches were held to have been conducted by private parties.

In *Corngold* v. *United States*, 367 F. 2d 1, 5-6 (9th Cir. 1966), customs agents had been following several men they suspected of smuggling watches and had already tested with radiation detection equipment some packages that had been consigned to an airline for shipping at the time they approached an airline employee and requested that the packages be opened. The court, in holding the search constituted federal action, relied on the fact that the search

The aim of the Fourth Amendment, and of the exclusionary rule fashioned to guarantee its observance, is to prevent official misconduct, not to discourage private citizens from aiding in the apprehension of criminals. *Coolidge* v. *New Hampshire, supra*, 403 U.S. at 488; *Burdeau* v. *McDowell, supra*, 256 U.S. at 475-476. Absent a valid claim of official instigation or participation in the search, petitioner can assert no Fourth Amendment protection.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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was conducted solely to further an ongoing federal investigation, as well as the fact that the customs agents actively joined in the search. Similarly, in *Smith* v. *Maryland, supra*, the pen register was installed, at police request, as part of a criminal investigation. Finally, in *Lustig* v. *United States*, 338 U.S. 74, 79 (1949), the "decisive factor" was that the federal official himself participated in the search of the premises.

DOJ-1979-04